Filed 12/21/09 P. v. Hosburgh CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CHAD MICHAEL HOSBURGH,

Defendant and Appellant.

F057177

(Super. Ct. No. MF49411)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Merced County. John Kirihara, Judge.

So'Hum Law Center and Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

[*] Before Ardaiz, P.J., Hill, J. and Poochigian, J.

Appellant Chad Michael Hosburgh stands convicted, following his no contest plea, of misdemeanor possession of ammunition by a person prohibited from owning or possessing a firearm. (Pen. Code, § 12316, subd. (b)(1).) He was admitted to probation on condition, inter alia, that he serve 60 days in jail. He now appeals, claiming the trial court erred by denying his motion to suppress evidence. (*Id*., § 1538.5.) For the reasons that follow, we will affirm.

THE SUPPRESSION HEARING[1]

A trial court hearing a motion to suppress evidence acts as the finder of fact. Under standard principles of appellate review, we uphold its factual findings, whether express or implied, if they are supported by substantial evidence. (Cf. *People v. Johnson* (1980) 26 Cal.3d 557, 578.) In so doing, we view the facts in the light most favorable to the trial court's ruling. (*In re Frank V.* (1991) 233 Cal.App.3d 1232, 1237, fn. 1.) We then exercise our independent judgment and "measure the facts, as found by the trier, against the constitutional standard of reasonableness" to determine whether the search or seizure was lawful. (*People v. Lawler* (1973) 9 Cal.3d 156, 160.)

Viewed in accordance with these principles, the evidence presented at the suppression hearing showed that around midnight of September 2, 2008, Merced County Sheriff's Sergeant Howard was on patrol in the Winton-Atwater area, when he saw a dark sedan turn southbound on Winton Way at what appeared to be a high rate of speed. Howard paced the vehicle and determined it was traveling at least 50 miles per hour. The posted speed limit was 35 miles per hour. The vehicle turned left, then proceeded into the right lane and passed another vehicle on the right. The driving seemed erratic to Howard, and he initiated a traffic stop for speeding and an illegal lane change.

---

1 Appellant originally was charged with a felony violation of Penal Code section 12316, subdivision (b)(1). The circumstances that rendered him a prohibited person within the meaning of the statute are not relevant to the issue on appeal, and so we do not recite them.

The vehicle yielded and Howard contacted appellant, who was the driver. There was a female in the front passenger seat, and a small child buckled into the backseat with a regular seat belt. Upon initial contact, appellant appeared to be very agitated. Howard asked whether he had a license; appellant said he did not. He verbally identified himself with what turned out to be his true name, but said he did not have any identification with him. The female also said she did not have identification or a driver's license with her.

Because Howard was standing in a traffic lane, he asked appellant to exit the vehicle and step to the rear while Howard ran his name through the dispatch center. Appellant complied, but exited the car rather hastily and his demeanor remained irritated. He was fidgeting, pacing within a very small area, constantly moving, and had a mean look on his face. Appellant's demeanor was excessive in terms of what Howard normally would encounter in a vehicle stop of this nature.

Howard decided to pat appellant down. He made this decision based on the totality of the circumstances: He had pulled the vehicle over for speeding and what he perceived to be erratic driving; it was midnight; appellant was agitated beyond what was reasonable; Howard had asked him to exit the vehicle; and appellant remained agitated while Howard spoke to him. Howard believed his safety was endangered and that appellant's behavior indicated he might be armed and dangerous. Howard patted appellant down and felt what he immediately recognized to be rounds of ammunition in appellant's left rear pocket.

The trial court found the appropriate standard to be whether, given the totality of the circumstances, it was reasonable for Howard to think a pat search was required for officer safety. In light of the circumstances in Howard's mind at the time, the court concluded a limited pat search for possible weapons was reasonable.

DISCUSSION

Aspects of appellant's briefs suggest he is disputing the legality of the detention as well as the search – two separate, albeit related, events. (See *Pennsylvania v. Mimms*

(1977) 434 U.S. 106, 109.) He did not do so in the trial court, instead confining his challenge to the pat search. Assuming he nonetheless may do so now, the detention was neither unlawful at the outset, nor had it become unduly prolonged by the time of the search. The speeding and illegal lane change justified stopping the vehicle for the purpose of warning or citing appellant. (Veh. Code, §§ 22107, 22350; *People v. Miranda* (1993) 17 Cal.App.4th 917, 926; *People v. Walker* (1969) 273 Cal.App.2d 720, 724.) Accordingly, Howard could order appellant out of the car, and ask for and examine his driver's license. (*Pennsylvania v. Mimms, supra,* 434 U.S. at p. 111; *People v. Miranda, supra,* 17 Cal.App.4th at p. 927.) Because appellant could not produce a driver's license, Howard reasonably could expand the scope of the stop. (*Ibid*.) Indeed, Howard was entitled to effect a custodial arrest. (Veh. Code, § 40302, subd. (a); *People v. Walker, supra,* 273 Cal.App.2d at p. 724.) Despite his "broad discretion" to do so, Howard also had discretion to accept appellant's oral identification. (*People v. McKay* (2002) 27 Cal.4th 601, 622.) The right to take appellant into custody gave Howard the right to detain him for a warrant check and/or an attempt to verify that identification. (See *People v. McGaughran* (1979) 25 Cal.3d 577, 583.)

Turning to the pat search, the concern for officer safety inherent in the case of any routine traffic stop does not, by itself, justify a search. (*Knowles v. Iowa* (1998) 525 U.S. 113, 117.) "[S]ince minor traffic offenses do not reasonably suggest the presence of weapons, an officer may not search the driver … unless the objective circumstances furnish reasonable grounds to believe the driver is armed and/or dangerous and may gain immediate control of a weapon. [Citations.]" (*People v. Miranda, supra,* 17 Cal.App.4th at p. 927; *Terry v. Ohio* (1968) 392 U.S. 1, 27, 30 (*Terry*).) The patdown "must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." (*Terry*, *supra*, at p. 20, fn. omitted.) "'There is no exact formula for the determination of reasonableness. Each case must be decided on its own facts and circumstances [citations] – and on the total atmosphere of the case. [Citations.]'

[Citation.]" (*People v. Superior Court (Kiefer)* (1970) 3 Cal.3d 807, 827.) "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (*Terry, supra,* 392 U.S. at p. 21, fn. omitted.) "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger. [Citations.] And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his [or her] inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he [or she] is entitled to draw from the facts in light of his [or her] experience. [Citation.]" (*Id*. at p. 27, fn. omitted.) Good faith on the part of the officer is not enough. (*Id*. at p. 22.)

In the present case, a lone officer effected a traffic stop late at night on a vehicle he perceived to have been driven erratically. When contacted, the driver was agitated beyond what, in the officer's experience, was normal. Because of the road's design, the officer could not safely speak to the driver through the car window, but instead had to have him exit the vehicle, thus removing whatever modicum of protection the physical barrier of the car's door provided. The driver exited the car hastily and remained irritated and with a mean look on his face throughout the encounter. He had no identification. Significantly, despite the fact the officer did not think he might be under the influence, he was pacing and constantly moving his body extremities. "All of these factors, although perhaps individually harmless, could reasonably combine to create fear in a detaining officer. The *Terry* test does not look to the individual details in its search for a reasonable belief that one's safety is in danger; rather it looks to the 'totality of the circumstances.' [Citation.] In the instant case, it seems reasonable that these circumstances could generate a belief in a police officer that his safety was in danger."

(*People v. Avila* (1997) 58 Cal.App.4th 1069, 1074.) Howard testified that he held such a belief, and that that was his reason for conducting the pat search.

Under the totality of the circumstances, we conclude the search was justified.[2] The cases relied on by appellant to argue the contrary are factually distinguishable.

DISPOSITION

The judgment is affirmed.

---

[2] Appellant makes no claim that, assuming the pat search was lawful, seizure of the ammunition was improper because it did not feel like a weapon. (See, e.g., *In re Lennies H.* (2005) 126 Cal.App.4th 1232, 1237; *People v. Thurman* (1989) 209 Cal.App.3d 817, 826.)